

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA**

Security National Insurance Company,  Plaintiff,  vs.  Schmitt Construction LLC and Michael Iron Heart,  Defendants.	Court File No.: <u>18-4052</u>  <b>COMPLAINT</b>
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Plaintiff, Security National Insurance Company (“Security National”), for its Complaint for Declaratory Relief states and alleges as follows:

1. Security National is a Delaware corporation with its principal place of business located in Texas.
2. Schmitt Construction LLC (“Schmitt Construction”) is a South Dakota limited liability company. Schmitt Construction members are Emery Schmitt, Jr. and Cathy Schmitt. Emery Schmitt and Cathy Schmitt are citizens of South Dakota.
3. Michael Iron Heart is a citizen of South Dakota.
4. On May 24, 2017 Michael Iron Heart was seriously injured when he fell while working on the job site for the construction of a new single family home being built in South Dakota.
5. At the time of the accident, Schmitt Construction was the general contractor on the new home project.

6. Mr. Iron Heart threatened suit against Schmitt Construction and provided Schmitt Construction with a copy of a Complaint. A copy of the Complaint is attached as Exhibit A.

7. Mr. Iron Heart demanded \$1,000,000 to settle his threatened claims against Schmitt Construction.

8. Emery Schmitt d/b/a Schmitt Construction is the named insured under a commercial general liability policy, policy number NA113416501, issued by Security National Insurance Company and in force from September 3, 2016 to September 3, 2017 (“Policy”). The Policy’s liability limits are \$1,000,000. A copy of the Policy is attached as Exhibit B.

9. Security National issued a reservation of rights and there now exists a justiciable controversy capable of resolution by this Court concerning the nature and scope of insurance available under the Policy issued by Security National.

10. This Court has jurisdiction under 28 U.S.C. § 1332 in that this is a dispute between citizens of different states involving an amount in controversy in excess of \$75,000. Venue is appropriate under 28 U.S.C. § 1391.

11. The Policy includes endorsements that exclude coverage when the insured is a general contractor in connection with the construction of a new home. Those endorsements provide in part:

## **EXCLUSION – DESIGNATED WORK**

### **SCHEDULE**

#### **Description of your work:**

CONSTRUCTION OF NEW HOMES AS A GENERAL CONTRACTOR OR DEVELOPER.

This insurance does not apply to “bodily injury” or “property damage” included in the “products-completed operations hazard” and arising out of “your work” shown in the Schedule.

\* \* \*

## **EXCLUSION – DESIGNATED ONGOING OPERATIONS**

Construction of new homes as a general contractor or developer

#### **Specified Location (If Applicable):**

The following exclusion is added to paragraph 2., Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages):

This insurance does not apply to “bodily injury” or “property damage” arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others.

Unless a “location” is specified in the Schedule, this exclusion applies regardless of where such operations are conducted by you or on your behalf. If a specific “location” is designated in the Schedule of this endorsement, this exclusion applies only to the described ongoing operations conducted at that “location”.

12. Mr. Iron Heart’s accident took place while work on the new home project was on-going. Pursuant to the Policy’s Designated Ongoing Operations endorsement there is no coverage available and Security National has no duty to defend or to

indemnify Schmitt Construction in connection with the claims threatened by Mr. Iron Heart.

13. The Policy also includes the following exclusions:

\* \* \*

**d. Workers' Compensation And Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

**e. Employer's Liability**

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
  - (a) Employment by the insured; or
  - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

14. The Policy includes an endorsement that modifies the employer's liability exclusion and provides in part:

**AMENDMENT – EMPLOYER’S LIABILITY EXCLUSION**

**(EXCLUSION – BODILY INJURY TO EMPLOYEES – ABSOLUTE)**

Exclusion e. Employer’s Liability of item 2. Exclusions, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, SECTION I – COVERAGES is replaced by the following:

e. Employers Liability

“Bodily Injury” to:

- (1) An “employee” or “temporary worker” of any insured arising out of and in the course of:
  - (a) Employment by any insured; or
  - (b) Performing duties related to the conduct of an insured’s business; or
- (2) The spouse, child, parent, brother or sister of that “employee” or “temporary worker” as a consequence of paragraph (1) above.

This exclusion applies:

- (1) Whether an insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

15. To the extent Mr. Iron Heart was an employee or temporary worker of Schmitt Construction at the time of the accident there would be no coverage available under the Policy pursuant to the employer’s liability exclusion and Security National would have no duty to defend or to indemnify Schmitt Construction in connection with the claims threatened by Mr. Iron Heart.

16. Pursuant to all of the terms and conditions of the Policy there is no coverage available for any of the injuries sustained by Mr. Iron Heart as a result of his job

site accident and Security National is entitled to a declaration that it has no duty to defend or indemnify Schmitt Construction.

WHEREFORE, Security National prays for judgment in its favor declaring and adjudging that it has no duty to defend or indemnify Schmitt Construction and awarding Security National its costs, disbursements and attorney fees incurred in connection with this matter together with such further relief as this Court deems just and proper.

Date: May 11, 2018

**LARSON · KING, LLP**

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